

# WESTERN MINING ACTION PROJECT

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July 26, 2022 – Via Email

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**Re: Freedom of Information Act (FOIA) Request**

This is a Freedom of Information Act (“FOIA”) request from the Arizona Mining Reform Coalition (AMRC), submitted by and through AMRC’s undersigned attorney, for records related to Queen Creek, near Superior, Arizona, which is listed as an “impaired” water under Section 303(d) of the Clean Water Act. 33 U.S.C. §1313(d). Just recently, EPA approved the Arizona Department of Environmental Quality’s (“ADEQ”) proposed 303(d) list (with objections for waters not relevant here). *See* June 16, 2022 letter from Tomás Torres, Director, EPA Region 9 Water Division, to Trevor Baggione, Director, ADEQ Water Quality Division. This request includes any study, report, draft or otherwise, regarding a Total Maximum Daily Load (“TMDL”) study or report for Queen Creek prepared by either ADEQ or EPA. A more specific records request is detailed below.

Queen Creek Reach No. 15050100-014A, (headwaters to the Superior Wastewater Treatment Plant discharge), has been listed on Arizona’s 303(d) list as impaired for dissolved copper since 2002. Reach No. 15050100-014B, (Superior Wastewater Treatment Plant discharge to Potts Canyon) has been listed as impaired for dissolved copper since 2004. Reach No. 15050100-014C (Potts Canyon confluence to the Whitlow Dam) has been listed as impaired for dissolved copper since 2010. This first reach is also impaired for lead (2010) and selenium (2012). *See*

Arizona's 303(d) List of Impaired Waters. *See* Arizona's current (2022) 303(d) List of Impaired Waters: "ARIZONA'S 2022 CLEAN WATER ACT ASSESSMENT (JULY 1, 2012 TO JUNE 30, 2021) Integrated 305(b) Assessment and 303(d) Listing Report." [pn\\_draft2022cwaa.pdf \(azdeq.gov\)](#); [2022\\_cwaa\\_app.xlsx \(live.com\)](#) (appendices to Assessment Report, listing Queen Creek as a Priority 5 Impaired Water).

Detailed Records Request: Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, AMRC respectfully requests the following:

- Any and all copies of any draft TMDL study (and any supporting documents, exhibits, and attachments) for Queen Creek that EPA has received from or sent to ADEQ from January 1, 2010 to present (as noted above, portions of Queen Creek have been listed as "impaired" since 2002). In October 2017, ADEQ released a draft TMDL for public comment. Public comments were collected, and the comment period closed in December 2017. Per an update email sent out from ADEQ on September 27, 2018, the TMDL had not been approved and instead ADEQ stated that preparation of the TMDL had been suspended.  
This includes any and all "records" (as defined below) in EPA's possession, custody or control related to the above described TMDL study/report (including any supporting documents, exhibits, attachments, modeling reports, and load and waste load allocations, calculations, or analysis) for Queen Creek that have been (a) received by EPA, its employees or consultants from ADEQ or Resolution Copper Mining, their affiliates, or any consultant, testing laboratory or outside party; and/or (b) prepared, produced, or collected by EPA, its consultants or employees regarding ADEQ's TMDL study for Queen Creek from January 1, 2002 to present.
- Any and all "records" (as defined below) in EPA's possession, custody or control regarding Queen Creek, including the above mentioned draft TMDL (and any supporting documents, exhibits, and attachments), as well as any records, data, studies, reports, analysis (and any supporting documents, exhibits and attachments) regarding Queen Creek's status as an "impaired" water under Section 303(d). This includes but is not limited to records concerning any discussion, meetings, or communications between EPA, ADEQ, Resolution Copper Mining, their affiliates, or any employee, consultant, testing laboratory or outside party, regarding Queen Creek from January 1, 2002 to present.<sup>1</sup>
- Please Note: This request does not include records previously provided by EPA to AMRC pursuant to AMRC's FOIA request dated February 1, 2019 regarding the Queen Creek TMDL. EPA produced the records on March 18, 2019. *See* EPA-R9-2019-003232; March 18, 2019 letter from Tomas Torres, Director, EPA Region 9 Water Division to Roger Featherstone, AMRC.

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<sup>1</sup> ADEQ has issued an AZPDES discharge permit to Resolution Copper for discharges into Queen Creek from the proposed Resolution Copper Project (Permit No. AZ0020389). The AZPDES permit allows discharges of mine site stormwater from Outfall 001 and discharges of treated mine project water from Outfall 002 (as of 2010) to an unnamed wash, tributary to Queen Creek, located upstream of Boyce Thompson Arboretum and the local community of Queen Valley. ADEQ has repeatedly renewed its AZPDES permit for Resolution. [ADEQ Public Notice \(azdeq.gov\)](#)(2016); [fs\\_resolution\\_cu.pdf \(azdeq.gov\)](#).

- Any and all “records” (as defined below) in EPA’s possession, custody or control related to the AZPDES discharge permit to Resolution Copper for discharges into Queen Creek or its tributaries (Permit No. AZ0020389) from January 1, 2002 to present.

Any and all “records” includes but is not limited to, communications and documents on paper, digital, and any other format including emails, letters, memoranda, notes, recordings, maps, graphics, spreadsheets, charts, meeting agendas, meeting records, and internal and external review documents of any type.

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material.

Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation. If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and electronically transmit the non-exempt portions of such records to the undersigned AMRC attorney at the address above within the statutory time limit. 5 U.S.C. § 552(b).

Pursuant to FOIA, please provide an Estimated Completion Date (ECD) for this request as required by 5 USC §552(a)(7)(B)(ii).

**We ask that you please make these records available to us in an electronic format.** Should the EPA elect to withhold or redact any of the documents relating to the above request, please note that FOIA provides that if only portions of a requested file are exempted from release, the remaining segregable portions must still be released. We therefore request that we be provided with all non-exempt portions that are reasonably segregable. We further request that you describe the deleted material in detail (including date, author, recipient, record description, and parties copied), and specify the statutory basis for the denial under FOIA as well as your reasons for believing the alleged statutory justification applies in this instance.

## **REQUEST FOR FEE-WAIVER**

**Arizona Mining Reform Coalition** is a non-profit organization working in Arizona to improve state and federal laws, rules, and regulations governing hard rock mining to protect communities and the environment. AMRC works to hold mining operations to the highest environmental and social standards to provide for the long term environmental, cultural, and economic health of Arizona. Members of the Coalition include: the Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Concerned Climbers of Arizona, Courtland Ghost Town, Dagoon Conservation Alliance, Earthworks, Environment Arizona, Groundwater Awareness League, Maricopa Audubon Society, Save the Scenic Santa Ritas,

Grand Canyon Chapter of the Sierra Club, Sky Island Alliance, Tucson Audubon Society, Arizona Trail Association, and the Valley Unitarian Universalist Congregation.

AMRC requests that you waive all fees in connection with this matter. As shown below, AMRC meets the test under FOIA for a fee-waiver, 5 U.S.C. § 552(a)(4)(A)(iii). *See also* Judicial Watch v. Rossotti, 326 F.3d 1309 (D.C. Cir. 2003).

In considering whether AMRC meets the fee-waiver criteria, it is imperative that the EPA remember that FOIA carries a presumption of disclosure and was designed specifically to allow non-profit, public interest groups such as AMRC access to government documents without the payment of fees. As stated by one Senator, “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Id.* Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by “watchdog” organizations, such as environmental groups like AMRC, which use FOIA to monitor and challenge government activities. This waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups. Better Gov’t Ass’n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984).

**I. DISCLOSURE OF THIS INFORMATION IS IN THE PUBLIC INTEREST BECAUSE IT WILL SIGNIFICANTLY CONTRIBUTE TO PUBLIC UNDERSTANDING OF THE OPERATIONS OR ACTIVITIES OF THE GOVERNMENT. THIS REQUESTED INFORMATION WILL SIGNIFICANTLY CONTRIBUTE TO PUBLIC UNDERSTANDING OF THE ISSUES INVOLVED.**

**A. The subject of the request concerns the operations and activities of the government.**

The subject matter of this request relates the protection of US public water and related activities. It is clear that the EPA’s consideration of the quality of water is a specific and identifiable activity of the government (See Judicial Watch, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted)).

**B. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).**

The information requested will provide AMRC with crucial insight on the EPA’s management of water quality. The release of these documents will certainly contribute to better public understanding of EPA activities and operations. Numerous studies have demonstrated that there is broad public support for the protection of the environment. The provided information will

inform the public on the activities of the EPA in relation to the protection of the environment imminently threatened by discharge of pollutants into an impaired water of the US. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, such as the survival of species, have been conducted. See Judicial Watch, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

In McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents potentially provide new information about EPA’s actions related to the water quality of Queen Creek. Moreover, the information will provide important oversight of EPA activities by revealing what information the EPA relies upon in regulating the proposed and current operations. See Western Watersheds Project v. Brown, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also Community Legal Services v. HUD, 405 F.Supp.2d 553 (D. Pa. 2005) (“[T]he CLS request would likely shed light on information that is new to the interested public.”). Finally, this request will also shed light on whether the EPA is taking adequate action to protect the environment from current and proposed mining activities.

### **C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.**

Public understanding of public agency management of public waters will significantly increase as a result of disclosure because the requested information will help determine the activities of the EPA in regards to the use of public lands from mining activities. Once the public is more aware of actions by the EPA, the public will have a better understanding of the determinations made by the EPA and their appropriateness.

Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. AMRC intends to fulfill its well-established function of public oversight of agency action. AMRC is not requesting these documents merely for their intrinsic informational value. It is irrelevant whether any portion of this request may currently be in the public domain, because AMRC requests considerably more than any piece of information that may currently be available to other individuals. Judicial Watch, 326 F.3d at 1315.

In addition, AMRC plan to take the information it learns from the disclosed documents and educate the public about the impacts of water pollution on the environment, and also educate the public about whether agency actions are appropriate in light of the known information. See Western Watersheds Project, 318 F.Supp.2d at 1040 (“In the letter denying the appeal, the FOIA Officer stated that WWP had failed to demonstrate....how the information would contribute to the understanding of the general public of the operations or activities of the government. The Court, however...finds that WWP adequately specified the public interest to

be served, that is, educating the public about the ecological conditions of the land managed by the BLM and...how management strategies employed by the BLM may adversely affect the environment.”).

The requested information will make public what information the EPA has on impacts to the environment from mining activities and EPA’s actions in relation to that information, particularly whether the effects determinations are firmly grounded in the best available scientific information. There can be no dispute that disclosure of the requested documents may provide information that will significantly enhance the public’s understanding of EPA’s legal obligations and EPA management of public water. Even if the documents fail to reveal that certain actions need to be taken does not mean the documents do not serve the public interest. See Judicial Watch, 326 F.3d at 1314.

## **II. OBTAINING THE INFORMATION IS OF NO COMMERCIAL INTEREST TO AMRC.**

Access to government documents, and similar records through FOIA requests is essential to AMRC’s role of educating the general public. AMRC, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

## **III. AMRC HAS A RECOGNIZED ABILITY TO DISSEMINATE THIS INFORMATION BROADLY.**

AMRC intends to disseminate to the general public any pertinent information obtained by this FOIA request on our website and by other means.

AMRC is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. AMRC has been substantially involved in the management activities of numerous government agencies regarding Queen Creek, and has consistently displayed their ability to disseminate information granted to it through FOIA.

Public oversight and enhanced understanding of EPA duties is absolutely necessary. AMRC’s members’ track record of active participation in oversight of governmental agency activities and their consistent contribution to the public’s understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject*. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994) (emphasis added). AMRC need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” Judicial Watch, 326 F.3d at 1314. It is sufficient for AMRC to show how it distributes information to the public generally. Id.

The documents sought in this FOIA request will be used to determine what actions EPA is or is not taking in regards to this activity. They will also be used to determine whether and how

the EPA is complying with and implementing its obligations under environmental laws. Concurrent with any action which AMRC may take after obtaining the requested documents, AMRC will publicize the reasons for the action and the underlying actions of the EPA and/or other agencies that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of the EPA's responsibilities. AMRC has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one, and has also many times publicized the conservation measures being taken on their behalf through information gained from FOIAs like this one. AMRC intends to use the documents requested in this request in a similar manner.

In addition, AMRC's informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. *See* AMRC's webpage at [www.azminingreform.org](http://www.azminingreform.org)

Information obtained through this request will likely be disseminated through all of these means. *See Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

Records received by AMRC pursuant to this FOIA request will be available on its website, which are regularly used by students, journalists, other organizations, and members of the public to obtain information on the conservation and water quality issues related to Queen Creek and the Resolution Copper Mine. *See*: [www.azminingreform.org](http://www.azminingreform.org)

## **CONCLUSION**

For the foregoing reasons, AMRC qualifies for a full fee waiver. We trust that the EPA will immediately grant this fee waiver request and begin to search and produce the requested records and meet all FOIA statutory deadlines and requirements. Please contact the undersigned if AMRC's fee waiver request is denied, before conducting a search and records production that may result in costs to AMRC of more than \$100.00.

Please direct all communications and responses to this FOIA request to the undersigned attorney for AMRC.

Thank you,

*/s/ Roger Flynn*  
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Western Mining Action Project

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